Filed 2/25/05 Kaplan v. Breslow CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RAYMOND S. KAPLAN, Plaintiff and Appellant, v. WARREN L. BRESLOW, Individually and as Trustee, etc., et al. Defendants and Respondents.	B165509 (Los Angeles County Super. Ct. No. SC067494)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael B. Harwin, Judge. Affirmed.

Law Office of Joseph L. Golden, Joseph L. Golden; Marcin, Barrera & O'Connor, John B. Marcin for Plaintiff and Appellant.

Steven R. Friedman for Defendants and Respondents.

Plaintiff Raymond S. Kaplan appeals from the judgment entered on January 30, 2003, upon dismissal of his complaint after the trial court granted the demurrer of defendants Warren L. Breslow and related parties (collectively referred to as Breslow). The trial court sustained the demurrer without leave to amend Kaplan's complaint seeking judicial dissolution of a partnership, declaratory relief and damages on the grounds of the statute of limitations. Kaplan's contention is without merit that, because of the doctrine of equitable tolling, the judgment should be vacated and the case remanded with directions to stay it pending final judgment in a related case between the parties.

FACTUAL AND PROCEDURAL SUMMARY

We have taken judicial notice of the record and opinion recently filed in that related case, *Kaplan v. Breslow*, filed February 24, 2005, involving consolidated case Nos. B162063 and B165532 (*Kaplan I*).[1] It is unnecessary to repeat at length the underlying factual dispute between the parties, which is detailed in our prior opinion. It is sufficient here to mention only the immediately relevant facts.

In our recently filed opinion, we held that the referee who tried the underlying case properly granted summary judgment against Kaplan, whose complaint sought in part a judicial declaration that a partnership (the so-called "Venture" real estate partnership) between Kaplan and Breslow purportedly had been dissolved by operation of law because certain conduct by Breslow (relating to a 1995 settlement agreement) was inconsistent with the existence of a partnership. We held, as did the referee in the underlying case in granting summary judgment, that the partnership had *not* been dissolved for two reasons.

---

[1] Although obviously somewhat duplicative of our judicial notice of the entire record, for the sake of record convenience we have also granted Kaplan's motion to take judicial notice of the first amended complaint in *Kaplan I* and annexed supporting documents (filed August 29, 1997).

First, we held Breslow's actions could not have been so inconsistent with the purpose of the Venture partnership (which was to acquire a 15% interest in another partnership, the so-called "Channel Gateway" real estate partnership) as to have destroyed the Venture partnership, because the purpose of the partnership had been accomplished and, most significantly, the uncontroverted facts established that Venture had not in fact lost its 15 % interest in Channel Gateway. (*Kaplan I,* at pp. 15-16.) Second, we held in *Kaplan I,* as did the referee there, that the grounds for dissolution of the Venture partnership urged by Kaplan could not result in dissolution automatically by operation of law, but rather required a judicial decree of dissolution (former Corp. Code, § 15032), which Kaplan had not sought by proper application.

The present appeal is from Kaplan's belated attempt to seek such a judicial decree of dissolution. On July 9, 2001, Kaplan filed a complaint seeking dissolution of partnership, declaratory relief and damages. Breslow demurred on two grounds: (1) that the lawsuit was time-barred by the statute of limitations (Code Civ. Proc., § 430.10, subd. (e)) because the alleged wrongs involving the 1995 settlement agreement occurred six years prior to filing; and (2) that there was "another action pending" (Code Civ. Proc., § 430.10, subd. (c)) on the same facts adjudicated against Kaplan and pending before the Court of Appeal (i.e., *Kaplan I*).

As noted by Breslow in his demurrer, in *Kaplan I* the referee had on June 29, 2001, transmitted by fax his decision to grant summary judgment against Kaplan. On July 13, 2001, the referee filed the summary judgment. Meanwhile, on July 9, 2001, Kaplan filed the complaint in the present case. But Kaplan waited until January 2, 2002, to serve the present complaint, which alleged in essence--as did the complaint in *Kaplan I*--that Breslow's participation in the 1995 settlement agreement resulted in the loss of Venture's 15% limited partnership interest in Channel Gateway. Breslow thus urged in his demurrer that because the acts complained of had occurred in 1995, six years previously, each of Kaplan's claims in the present case were barred by the statute of limitations. Breslow also urged that the present case would run afoul of the res judicata

doctrine, assuming the referee's summary judgment in *Kaplan I* was affirmed on appeal (which it recently was).

Kaplan opposed the demurrer, arguing that the statute of limitations should not bar the present complaint because of the doctrine of equitable tolling. According to the Kaplan, the ruling by the referee in *Kaplan I* (a case that had been timely filed) merely found that Kaplan "had not invoked the correct procedural vehicle" to obtain a determination that Venture purportedly had been dissolved. Kaplan thus urged that the demurrer be overruled or, alternatively, that the present action (as well as yet another related action--case No. BC257607, involving claims under a 1992 promissory note) be stayed pending the final outcome in *Kaplan I.* Breslow's reply to the opposition to the demurrer stressed that Kaplan did not deny that the instant complaint is identical to other complaints filed by Kaplan (both in state and federal courts) in that the complaint arises from the same operative facts, and urged that equitable tolling is inapplicable here and that Venture would not be prejudiced by dismissing the action.

On January 22, 2003, the trial court granted Breslow's demurrer to the complaint without leave to amend on the ground that "the complaint was identical to a prior complaint dismissed by the court and for [the other reasons also] stated in the moving papers." Thereafter, the court entered judgment in favor of Breslow.

DISCUSSION

Contrary to Kaplan's contention, the time-barred causes of action in the present complaint are not saved by the doctrine of equitable tolling. We thus decline the invitation to remand the case with directions to stay it pending a final judgment in *Kaplan I*.

"'In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, [the reviewing court] must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable.'" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 171.) A demurrer based on a statute of limitations "cannot be

sustained unless the cause of action is necessarily barred by a statute of limitations." (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 825.)

Here, the complaint in *Kaplan I* (case No. BC146720) was timely filed on March 22, 1996. However, the statute of limitations would bar the essentially similar causes of action in present complaint (case No. SC067494), which relate to events approximately six years prior to filing the case, unless the doctrine of equitable tolling applies. Equitable tolling "requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." (*Addison v. State of California* (1978) 21 Cal.3d 313, 319.) Proper application of the doctrine of equitable tolling can satisfy "the policy underlying the statute of limitations without ignoring the competing policy of avoiding technical and unjust forfeitures." (*Ibid.*)

To apply the doctrine of equitable tolling, a plaintiff must satisfy three elements: "(1) the plaintiff must have diligently pursued his or her claim; (2) the fact that the plaintiff is left without a judicial forum for resolution of the claim must be attributable to forces outside the control of the plaintiff; and (3) the defendant must not be prejudiced by application of the doctrine (which is normally not a factor since the defendant will have had notice of the first action)." (*Hull v. Central Pathology Service Medical Clinic* (1994) 28 Cal.App.4th 1328, 1336; see *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 361-362.) Kaplan fails to satisfy at least the first two of the above requisite elements.

Kaplan did not diligently pursue the claim now on appeal. As emphasized in Breslow's reply to the opposition to the demurrer and as also indicated in the appellate record in *Kaplan I*, when in September of 1999, Judge Richard Wolfe heard Kaplan's motion for summary judgment in *Kaplan I,* the court noted that Kaplan "had not properly

pleaded a cause of action for dissolution" and that his suit seeking declaratory relief was insufficient.[2]

Specifically, Judge Wolf stated: "Kaplan argues that the Venture partnership is initially dissolved by the Breslow defendants acting adverse to the interests of the partnership. The defendants, however, argue the Kaplan lacks standing because Kaplan cannot sue on his own or in his own name, and second that Kaplan didn't name Venture in the lawsuit and cannot name Venture because his, Kaplan's, partner Breslow did not approve of the suit on behalf of Venture. [¶] *Note that Kaplan's lawsuit does not include partnership dissolution.* [¶] It, the lawsuit, only seeks first invalidity of the settlement agreement or to invalidate the settlement agreement and challenges the partnership modification. [¶] *This court cannot, I believe, on its own, declare the partnership is dissolved,* and by so doing thereby conclude, first, the settlement agreement was improper and/or the modification of the partnership agreement substituting MEHP for Venture was improper. [¶] In order to so rule on either of those points, either the settlement agreement was improper or the modification of the partnership agreement substituting MEHP for Venture was improper, this court must of necessity--has to conclude that, one, Kaplan has standing and, two, the partnership is dissolved. [¶] *Evidence of dissolution of partnership is not before the court. . . .* [¶] *Basically, . . . I don't think there is a showing of dissolution here.*" (Italics added.)

Nonetheless, Kaplan's counsel insisted at the hearing on his summary judgment motion that, "with respect to the dissolution issue, California law provides that

---

[2] Kaplan's first amended complaint did not specifically seek as a distinct cause of action declaratory relief to establish dissolution of the partnership, but it did seek declaratory relief to establish the invalidity and unenforceability of the 1995 settlement agreement and its amendment. It is well settled that, "[P]artners or joint venturers many not bring suit against one another on causes of action arising from the partnership or joint venture business until there has been a dissolution of the partnership or joint venture . . . ." (*Stodd v. Goldberger* (1977) 73 Cal.App.3d 827, 837.)

dissolution is automatic upon the occurrence of an event which makes continuation of the partnership impossible. [¶] It is undisputed that Breslow signed . . . the agreement--which declared the sale by which Venture acquired its only asset, null and void. [¶] . . . Regardless of what they now say [Breslow] has . . . worked a dissolution of the partnership, which made Kaplan the nonbreaching partner, its liquidating partner, with standing to bring this lawsuit."[3]

After Judge Wolfe denied Kaplan's motion for summary judgment, Kaplan prepared a second amended complaint, which contained a cause of action for dissolution of the partnership and provided it to opposing counsel along with a proposed stipulation for filing. However, Kaplan *withdrew* that cause of action for dissolution of partnership and then, for whatever tactical or other reason,[4] filed instead a motion for leave to file a second amended complaint containing only another version of the declaratory relief action which Judge Wolfe had indicated was insufficient. The second amended complaint again sought a judicial declaration of the invalidity and unenforceability of the 1995 settlement agreement and its amendment, but also sought a judicial declaration that Venture had been dissolved by operation of law as of the date of that settlement agreement--but no application under the Corporations Code for dissolution.

It is thus apparent that Kaplan intentionally refused to file the proper cause of action, one for formal dissolution of Venture, even after being apprised of the appropriateness of doing so. Approximately two years passed between when Judge Wolfe indicated a cause of action for dissolution of the partnership was the proper

---

[3] This position by Kaplan was, of course, rejected by this court in our opinion in *Kaplan I.*

[4] Breslow speculates that Kaplan made that tactical decision not to seek dissolution of the partnership, because the Corporations Code did not contemplate a partner unilaterally dissolving a partnership, declaring himself the dissolving partner and seizing control of the assets of the partnership.

approach and when the referee in *Kaplan I* granted summary judgment in favor of Breslow. Despite such a span of time, Kaplan failed to file an action for dissolution of Venture until his belated effort now under review, which was after the referee's adverse determination.

There is nothing equitable about compelling Breslow to defend multiple actions by Kaplan, who deliberately decided not to plead a proper cause of action for dissolution, when he could have done so long ago. Therefore, Kaplan has failed to satisfy the first two requirements for equitable tolling--he did not diligently pursue his claim, and his failure now to have yet another judicial forum for resolution of his claim is not attributable to forces outside Kaplan's control, but rather is attributable to Kaplan himself.[5]

Accordingly, Kaplan has failed to establish the requisite elements for equitable tolling of the statute of limitations, and the trial court properly granted the demurrer without leave to amend. We thus affirm and decline to vacate the judgment and remand with directions to stay the matter pending finality of the decision in *Kaplan I*.[6]

Finally, we note that at the end of Breslow's appellate brief, he requests the imposition of sanctions for the cost of responding to an unnecessary and frivolous appeal. However, California Rules of Court, rule 27(e), requires a party seeking sanctions on appeal to file a formal motion with an appropriate declaration, which Breslow failed to do. Accordingly, his request for sanctions on appeal must be denied.

---

[5] It is thus unnecessary to address the third element for equitable tolling; i.e. prejudice to the defendant, which has typically been interpreted to mean prejudice that impedes the ability to prepare a defense.

[6] We therefore need not reach the issue of whether the decision in *Kaplan I* constitutes collateral estoppel as to the complaint in the present case--an issue touched on, but not fully briefed in the present appeal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

NOTT, J.

DOI TODD, J.